

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANDREW GAYOT,

Plaintiff,

v.

C.O. NICHOLAS SUED,
C.O. MATTHEW PETROSINO,
C.O. JONATHAN RAYMOND,
SGT. PATRICK RILEY,

Defendants.

DECISION AND ORDER

6:21-CV-06689 EAW

INTRODUCTION

Pro se plaintiff Andrew Gayot (“Plaintiff”) initiated this action pursuant to 42 U.S.C. § 1983 on November 12, 2021. (Dkt. 1). Currently pending before the Court is a Report and Recommendation (the “R&R”) issued by United States Magistrate Judge Marian W. Payson recommending the denial of Defendants’ motion to dismiss. (Dkt. 24). For the reasons set forth below, the Court adopts the R&R in its entirety. As a result, Defendants’ motion to dismiss (Dkt. 21) is denied.

BACKGROUND

As set forth in the R&R, Plaintiff did not appear for his scheduled virtual deposition on February 8, 2024. (Dkt. 24 at 1). Counsel for Defendants contacted the Green Haven Correctional Facility, where Plaintiff was incarcerated, and facility staff informed counsel that Plaintiff refused to leave his cell to attend the deposition. (*Id.*). On February 9, 2024, Defendants’ counsel received a letter from Plaintiff indicating that he refused to leave his

cell because he did not know that he had a “legal callout.” (*Id.* at 2). Plaintiff stated that he would attend the deposition when it was rescheduled. (*Id.*). On February 12, 2024, Defendants filed a motion to dismiss Plaintiff’s claims pursuant to Rules 37 and 41(b) of the Federal Rules of Civil Procedure, based on Plaintiff’s failure to prosecute and failure to comply with a Court order, including by failing to participate in a deposition. (Dkt. 21 at 1).

On April 23, 2024, Judge Payson issued the R&R, recommending that Defendants’ motion to dismiss be denied. Judge Payson granted Defendants’ alternative request for an extension of the scheduling order, which was issued that day. (Dkt. 24; Dkt. 25). No party filed objections to the R&R.¹

DISCUSSION

Pursuant to 28 U.S.C. § 636(b)(1), the parties had 14 days to file objections to the R&R. No objections were filed. The Court is not required to review *de novo* those portions of a report and recommendation to which objections were not filed. *See Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure [to timely] object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”). Notwithstanding the lack of objections, the Court has conducted a careful review of the

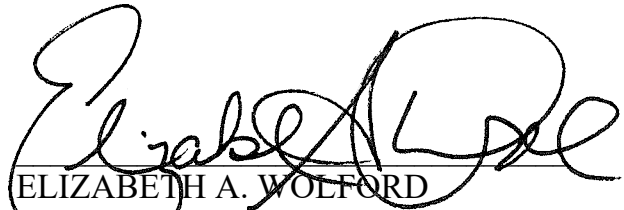
¹ On May 1, 2024, the Court received a letter from Plaintiff stating that he had been transferred “several times” to different facilities and that he was currently at Auburn Correctional Facility. (Dkt. 26). He stated that his failure to appear for his deposition was “not entirely my fault” and that he looked forward to the rescheduled deposition. (*Id.*).

R&R, as well as the prior proceedings in the case, and finds no reason to reject or modify the R&R.

CONCLUSION

For the foregoing reasons, the Court adopts the R&R (Dkt. 24) in its entirety and denies Defendants' motion to dismiss (Dkt. 21).

SO ORDERED.



ELIZABETH A. WOLFORD
Chief Judge
United States District Court

Dated: May 13, 2024
Rochester, New York